

PUBLIC LAW BOARD 7109

Case 19  
Award 19  
Carrier's File No.: 1468278D  
Organization's File No.: AN538-528-23/MA  
NMB Code: 106  
Claimant Yardman M. L. Cole

PARTIES TO THE DISPUTE:

UNITED TRANSPORTATION UNION

AND

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

Yardman M. L. Cole for the removal of Level 4 of the UPGRADE Progressive Discipline Policy (30 days actual suspension) from his personal record, the restoration of any and all EQMS points deducted from the Claimant's score, and he be compensated for any and all lost time, including all time withheld from service, and time spent attending an investigation held on January 18, 2007, reconvened on February 9 and 12, 2007, when charged with an alleged responsibility in connection with the charge that "an FTX Event Recorder evaluation on December 27, 2006, allegedly reveled (sic) UP 5217, ZCIGI-08 traveling at 59 mph through a permanent speed restriction area on the Geneva Subdivision (Glen Ellyn, MP 22.3) TTSI-02 45 mph, while being operated by K. J. Cummins, Locomotive Engineer and M. L. Cole, Conductor on 3x80 on December 12, 2006, at approximately 22:41 hours."

Findings:

The Claimant was hired by the Carrier on November 4, 2002. He works as a Yardman out of the Chicago Service Unit.

On December 12, 2006, the Claimant worked assignment 3X80 at Proviso, Illinois. He was taken from Proviso to Winfield, Illinois where he was to relieve the crew

of ZCIGI-08. The Claimant operated the train from there to Global 1. One of the Units on the Claimant's train was Locomotive 4881 with the lead locomotive being Unit 5217.

On December 26, 2006, Manager of Operating Practices (MOP) Talley received an auto scan download from Locomotive 4881. The download reportedly demonstrated the locomotive was traveling at a speed of 58 mph between Mile Post (MP) 22.3 and MP 25.4, where the speed restriction was 45 mph. Then, by using various reports as well as the Dispatcher voice tapes, he determined the Claimant's crew was operating the train during this time. A subsequent review of the Claimant's Conductor's log also verified this information.

The MOP also obtained a download from Locomotive 5217 which confirmed the train exceeded 55 mph for approximately a minute.

A Notice of Investigation was sent on December 29, 2006, directing the crew to attend a formal Investigation on January 8, 2007, at the Administration Building, Northlake, Illinois. The purpose of the Investigation was to develop the facts and determine responsibility, if any, in connection with the charge the Claimant's train exceeded the speed limit on the Geneva Subdivision (Glen Ellyn) on December 27, 2006. The Claimant was withheld from service.

The hearing was postponed and commenced on January 18, and was continued to February 9, and February 12, 2007. After reviewing the evidence adduced at hearing, the Carrier sent notice to the Claimant by letter dated February 22, 2007, he was found culpable of the charges and was being assessed a Level 4 Discipline, a thirty (30) days actual suspension.

The Organization took exception to the discipline and filed an appeal on behalf of the Claimant.

#### Carrier's Position

The Carrier advises the Board that while it made an offer of leniency to the Claimant during the appeal process, it none-the-less firmly believes there was substantial evidence to support the Carrier's findings. They argue offers of leniency are considered the sole discretion of the Carrier. They cite Second Division Award 13832 in support of their contention.

They go on to cite Arbitral authority that agrees the Carrier must support their actions through substantial evidence. They contend they have met this burden and have provided more than substantial evidence during the hearing which demonstrated the Claimant's culpability. They point to the download presented by MOP Talley which showed each engine was exceeding the restricted speed between MP 22 and 22.4. They submit this was a violation of Rule GCOR 6.31.

They dismiss the Organization's contention the downloads presented had numerous discrepancies and were subject to manipulation. They contend the Organization failed to articulate one such discrepancy or provide any citations of these discrepancies. They insist the use of downloads to demonstrate what occurred during the operation of the train is common practice. They add further that none of the discrepancies is fatal to the reliability of the downloads. They also contend differences between the downloads from the two separate units can be attributed to the different wheel size of each unit. They also insist the Organization never presented any evidence to demonstrate MOP Talley's methods for determining the mile post locations. In any case, they say, the downloads of both units show the train was traveling at an excess rate of speed.

The Carrier objects to the use of the Locomotive Engineer Review Board (LERB), FRA Docket No. EQAL2007-17. They say LERB Decisions have no weight in resolving discipline rendered under the Collective Bargaining Agreement. They cite SBA 235, Award 3223 (Lynch); First Division Award 25116 (Vernon) and PLB 5944, Award 10 (Peterson) as support for this contention. They maintain the Organization's argument is not convincing in mitigating the violation.

They assert the discipline assessed was reasonable and consistent with Company Policy. They cite arbitral authority which supports the Carrier's right to hold employees accountable for violations of safety rules. They declare the Board has no authority to alter discipline supported by substantial evidence unless there is evidence management abused its discretion. This is true, they maintain, even if the Board may have arrived at a different conclusion.

The Carrier refutes the procedural issues raised by the Organization. They argue the Notice of Investigation was sent within ten (10) days from when the Carrier knew of the rule infraction, which was December 26, 2006. Even at that point, they maintain the MOP did not know who was operating the train on the day in question at

that particular location. The Notice of Investigation was sent on December 29, 2007, well within ten (10) days of when the violation was discovered. In addition, they contend the hearing was set within the required ten (10) days. They point out the hearing was postponed at the request of the employee Representative.

In response to the Organization's assertion the Claimant was improperly held out of service pending the Investigation, they argue the nature of the Claimant's offense was considered a major offense. They contend the rule allows the Carrier to withhold employees from service if they commit major offenses.

They insist it was perfectly acceptable for the Hearing Officer who managed the Claimant to prepare a corrective action plan. They argue it had no bearing on his ability to be an objective and fair Hearing Officer.

They deny the Claimant would have been exonerated by missing sections of the transcript resulting from a broken recorder during the hearing. They contend the recorder was broken prior to any testimony or other evidence and had no bearing on the outcome. They say the parties collectively ensured the recreation of all missing items.

They also fault the Organization's assertion the Carrier failed to call witnesses to the hearing, particularly the Dispatcher. They reveal the Claimant nor the Organization ever made a request to have the Dispatcher testify. Moreover, no objection was raised during the Investigation protesting the absence of the Dispatcher.

#### Organization's Position

The Organization disputes the Carrier's assertion they did not know about the alleged speed limit violation until December 27, 2006. They contend, the locomotive event recorder was downloaded on December 13, 2006. They track the download from Omaha, to Proviso where it was received by Director of Road Operations, Mr. Pawluk, who then sent the download to Manager of Operating Practices (MOP) Mr. Horvath, who was on vacation and did not review the download. They say, Mr. Pawluk then sent the download to MOP Erickson who reviewed the download and sent it on to MOP Talley, who reviewed the download on December 27, 2006, and charged the Claimant with a violation. They argue the Carrier had the download in their possession for fifteen (15) days. They contend the Carrier cannot allege they lacked knowledge of the

download until December 27, 2006. It is obvious several Carrier Officers handled the download and the Carrier should have known the content.

The Organization goes on to cite numerous Awards which have sustained claims when the Carrier has failed to comply with the time limits incorporated into the discipline rule. They contend the Board should follow the guidance of these Awards and conclude the Carrier was in violation of the required time limits. They maintain there is a long history of rendering discipline and holding an investigation in a timely manner. The Organization again cites a plethora of Awards supporting their assertion.

They further insist the Claimant was prejudged and not given a fair and impartial hearing. They assert the Carrier demonstrated this bias when they suspended the Claimant prior to the Investigation. They submit the Rule precludes the assessment of discipline without a fair and impartial Investigation. They argue removal from service constitutes discipline and prevents a fair and impartial Investigation. They specify numerous Awards which have held the Carrier cannot withhold an employee from service unless he is a risk to himself, other employees or the public. They say to do so demonstrates pre-judgment.

They point out the Claimant was inappropriately removed from service on December 27, 2006, fifteen (15) days after the alleged incident. They confirm the Claimant was permitted to work those fifteen (15) days and did so without incident. Moreover, they contend he was returned to service thirty-two (32) days later before the investigation was completed. Therefore, they say, it is apparent the Carrier did not consider the Claimant a harm to persons or property.

The Organization asserts a violation of the cited rule results in a Level 4 Discipline only when the Engineer and Conductor exceed authorized speed by 10 MPH or  $\frac{1}{2}$  authorized speed, whichever is less. They reiterate the Carrier's contention the Claimant was operating at fourteen (14) MPH over the posted speed limit of forty-five (45) MPH.

They draw the Board's attention to the revocation of the Engineer's license and the Decision of the FRA to whom the Engineer appealed the revocation. (FRA Docket Number EQAL-2007-17. Therein, the Review Board concluded, in part, that discrepancies in wheel size on the two locomotives could have affected speed calculations. Secondly, the MOP approximated distances rather than use Mile Post

markings. The Review Board also cited the short period of time the crew was allegedly outside the speed limits in addition to the possibility the train was only in the speed restricted zone for 0.1 mile. They ruled this short distance corresponded to a three-car length distance that was a staging area where the train was required to stop. They concluded the revocation of the Engineer's license was improper.

The Organization takes great exception to the evidence used to find the Claimant guilty in this case. They insist it is the Carrier burden to demonstrate the reliability of the evidence relied upon to prove the Claimant's guilt. They argue the Carrier has failed to meet this burden.

They suggest if the Board finds the Claimant bears some responsibility, the Claimant should receive no more than a Level 2 Discipline.

### Decision

The Board has carefully considered the Organization's assertions that the FRA Docket Number EQAL-2007-17, Decision Concerning the Union Pacific Railroad Company's Revocation of Mr. K. J. Cummins's Locomotive Engineer Certification, should be followed in this case. Despite the fact, the Board recognizes Decisions issued in another forum are infrequently relied upon in this forum, for a variety of sound reasons, we would find the Decision of the Engineer Review Board to be of value relative to the merits in this case. Primarily because the analysis of the event recorder information, the speed and distance analysis, along with the discussion on wheel measurements, is a major part of their conclusions. Given the expertise of this Review Board, those analyses cannot be ignored. Since their Decision is based on the same case, the same set of facts, the same crew it should be considered in arriving at a Decision on the merits. Many of the issues they raise and the conclusions they reach would be relevant to a finding in this case.

However, this Board cannot find its way to the merits. We have carefully reviewed the transcript and other evidence presented. It was obvious that Murphy's law was in effect throughout the three (3) day Investigation. Certainly many things went wrong, from an auto scan that wound its way from its retrieval to the eventual Charging Officer, to the faulty tape recorder which required the continuance to the second day, to the existence of a very convoluted, if not at times "interesting," 423 page transcript. The crew was charged with exceeding the 45 mph restricted speed by about 14 mph, 4

mph above the 10 mph leeway, for 45 seconds on December 12, 2006. That tape was reviewed on December 26, 2006, by the Charging Officer. After about 3/4 of the way through the transcript, it becomes clear the download was retrieved on December 13, 2006, by someone in Omaha who noted brake pipe inconsistencies and heavy reductions. The download was then sent to Director of Road Operations (DRO) Pawluk who forwarded the download to a Manager of Operating Practices (MOP) Horvath who was on vacation. It appears that no one to this point reviewed the download or else chose to take no action. The download was then sent to MOP Erickson on December 21, 2006. He reviewed the download relative to the brake pipe inconsistencies which involved his Engineer. He testified he saw there was also an excessive speed notation on the events recorder download and did not know the crew who operated the train during that time. He therefore, sent the download to the Charging Officer in this case, who determined the crew involved in the alleged speeding incident. He accomplished this on December 26, 2006, contacted the crew and interviewed them on December 27, 2006. The crew was charged on December 29, 2006, approximately 17 days after the download was sent to the property. Simultaneously, they were removed from service as a result of the speed violation despite the fact they had been working their full schedule since the alleged incident on December 12, 2006.

This Board is loath to sustain or dismiss a grievance on procedural grounds unless the evidence is clear that the procedural violation occurred and could have been avoided. It is clear the Carrier should have been aware of the infraction at least by December 15, 2006. Carrier Officers are expected to know the time limits of the Discipline Policy. They certainly must realize downloads often point out deficiencies in crews that constitute rule infractions. If discipline is to be constructive, employees must be made aware of these infractions as close to the time of the event as possible, for many reasons. The most important motive is to allow individuals the opportunity to address the issue while it is relatively fresh in their minds. The Carrier clearly failed to do this. If this offense was so serious it required the crew to be removed from service pending an investigation, the download should have been reviewed as soon as it was received and the appropriate crew interviewed.

The Carrier exacerbated this procedural error when they withheld the crew from service for thirty (30) days without a fair and impartial investigation. We recognize the Carrier may have been under some obligation as far as the Engineer and FRA Regulations were concerned, however, the same was not true of Claimant. It is certainly hard to justify removing an employee from service due to the seriousness of a

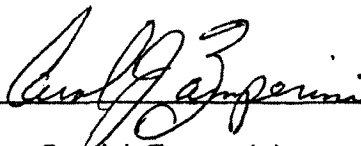
rule violation when you have allowed him/her to work at least 17 days after the incident occurred and in their regular positions. If nothing else, this substantiates the crew was not an imminent danger to themselves or others or to the public.


The Carrier violated the Claimant's due process rights when they failed to issue a Notice of Investigation in a timely manner. The claim is sustained.


Award

The claim is sustained.

The Carrier will comply with this Award within thirty (30) days of its receipt.

  
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Carol J. Zamperini  
Impartial Neutral and Chairperson

  
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Katherine N. Novak  
Carrier Member

  
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Michael J. Reedy  
Employee Member

Submitted this 22 day of August, 2008.